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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

THOMAS ROGERS LICHTEN, WILLIAM BOYD OLIVER, III, WILLIAM CODY WILSON, BILLY CHARLES MALONE, FRANK PINKERTON, WALLACE B. POTEAT, ROBERT V. STONE, VERNICE WAYNE OAKES, HARRY HALL WOMACK, III, ANTHONY C. KNEUPPER, JR., THOMAS ALFRED HIPP, ARTHUR R. YARBROUGH, GILBERT CAMPOS, VAN RICHARD VIEBIG, JR., ANYA ALLISTER, MARGARET T. POTEAT, ANNE KEITH FINLAYSON, JOE TERRY HAWTHORN, PAULA B. HAWTHORN, JULIE C. CADENHEAD, LYNDA N. SHAFFER, and MARGUERITE F. CORLEY,

Appellants

v.

THE STATE OF TEXAS,

Appellee

ON APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

MOTION TO DISMISS OR AFFIRM

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Appellants

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THE STATE OF TEXAS,

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Appellee, The State of Texas, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the above cause be dismissed on the ground that the appeal is not within the jurisdiction of this Court because it is not taken in conformity with the statutes and rules governing appeals to this Court and does not present a substantial federal question, or, in the alternative, Appellee moves that the judgment of the Court below be affirmed.

CITATION TO OPINION BELOW

The opinion below is adequately set forth in the jurisdictional Statement.

JURISDICTION

Appellee disputes the jurisdiction of the Court because the Texas statutes on unlawful assembly which are challenged by Appellant here are constitutional and hence no grounds for appeal to the Court exists.

QUESTION PRESENTED

Are the unlawful assembly statutes of Texas as promulgated and interpreted by the Courts constitutional; and alternatively, were Appellants deprived of any right guaranteed to them by the United States Constitution by the application of the unlawful assembly statutes to them in the performance of their activities as revealed by the facts of this case.

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

The First Amendment to the Constitution of the United States, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Articles 439 and 449 of the Penal Code of the State of Texas provide:

"Article 439. 'Unlawful assembly'

"An 'unlawful assembly' is the meeting of three

or more persons with intent to aid each other by violence or in any other manner either to commit an offense or illegally to deprive any person of any right or to disturb him in the enjoyment thereof."

"Article 449. 'To prevent any person from pursuing his labor'

"If the purpose of the unlawful assembly be to prevent any person from pursuing any labor, occupation or employment, or to intimidate any person from following his daily avocation, or to interfere in any manner with the labor or employment of another, the punishment shall be by fine not exceeding five hundred dollars."

STATEMENT OF THE CASE

On July 25, 1965, seventy-two-year-old Abe Dabaghi, the complainant, owned and operated in the city of Huntsville, Walker County, the Cafe Raven, which was open to and served the general public. On that day, twenty-six white persons, none of which resided in Huntsville or Walker County, came into the cafe shortly after four o'clock, p.m. Not all twenty-six entered at the same time but came in at separate intervals and seated themselves so as to have only one person sitting at a table or booth. Eventually, all tables and booths and alternate stools at the counters were occupied by the group. Some of the group ordered coffee, some Coca-Cola, and some merely wanted water. None of the members of the group were ever refused service. It took approximately three hours for them to consume their beverages. Later, around six o'clock, p.m., as customers entered the cafe and were waiting to be seated, Mr. Dabaghi asked one of the persons seated at a table to move and sit with another person

sitting alone at another table. The person refused, saying he wanted to sit by himself. Mr. Dabaghi then asked a man seated with two ladies at another table, "what's going on," and he replied, ". . . we are going to sit down, we want you to integrate . . ." Mr. Dabaghi replied that he had already made a public announcement carried by all the news media that his cafe was integrated. After several more requests to leave, the group refused. The Appellant, The Most Reverend Oliver, then informed Mr. Dabaghi that the group was going to sit in the cafe until he integrated the place and hired negro waitresses. Mr. Dabaghi again informed them that he had already integrated the cafe the night before and had served Negroes that Sunday morning. They still refused to leave and Reverend Oliver stated, "Well, you haven't officially notified HA-YOU that your cafe is integrated. If you will notify HA-YOU we will leave." Pursuant to instruction an effort was then made to give such notice to another Reverend Sampson, of HA-YOU, but he could not be located. The arresting officers asked the group to leave before arresting them. As a result of the sit-in by Appellants, complaints were executed by Mr. Dabaghi and the group was arrested upon process legally issued.

ARGUMENT

Appellants contend, in substance, that their First Amendment right of freedom of assembly was unconstitutionally abridged by application of the Texas Unlawful Assembly statutes to their sit-in in the Cafe Raven.

Appellant urges that these state statutes are vague and indefinite as to the acts prohibited.

He who would controvert the constitutionality of a statute must bear the burden of overcoming the strong presumption of its constitutionality. *United States v. Louis,* 100 A.2d 40 (1953), 214 F.2d 853 (1954), Aff'd. 348 U.S. 419 (1955).

It is axiomatic that a statute is not unconstitutionally vague simply because it fails to state with particularity every possible kind of conduct which it prohibits. *Jordan v. DeGeorge,* 341 U.S. 223 (1951); *United States v. Ragen,* 314 U.S. 513 (1942). Indeed, the Constitution does not require impossible standards. That there may be ". . . marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense . . ." *Roth v. United States,* 354 U.S. 476, 491 (1957).

In *Roth,* supra, the Court held that a statute which makes punishable the mailing of material that is "Obscene, lewd, lascivious, or filthy" was not fatally void for vagueness. In discussing the contention that the words of the statute are not sufficiently precise, the Court, at pp. 491-492, said:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' *United States v. Petrillo,* 332 U.S. 1, 7-8, These words, applied according to the proper standard for judging obscenity, already discussed,

> give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .' * * * [Citations omitted.]

In short, nothing more than "reasonable certainty" in a criminal statute is required. Thus, in *Boyce Motor Lines v. United States,* 342 U.S. 337, 340 (1952), the Court said:

> "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. * * *" [Footnote omitted.]

So long as the statute provides "reasonably ascertainable standards of guilty," no more is required. In *Seigman v. District of Columbia,* D.C. Mun.App., 48 A.2d 764, 765 (1946), in construing a vagrancy statute, the Court stated in refusing to void a regulation because of claimed vagueness:

> "Generally, as a matter of fundamental justice, a statute defining a crime must prescribe reasonably ascertainable standards of guilt in order that a citizen may know in advance just what acts are

> required or forbidden. The standards need not be so precise as to be capable of reduction to an exact mathematical formula, or of mechanical application. * * *".

At no time has this Court suggested that the criminal law must graphically be plotted on pages of the statute books, for the words of a statute are, after all, but symbols. And, as this Court has observed, ". . . few words possess the precision of mathematical symbols, most symbols must deal with untold and ununforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, *no more than a reasonable degree of certainty can be demanded . . .*" *Boyce Motor Lines, Inc. v. United States,* supra.

The Texas Court of Criminal Appeals has given these Articles 439 and 449 very narrow interpretations and required that the indictments set out in detail the matter with which the persons are actually charged. For example, *Blackwell v. State,* 18 S.W. 676, the court said that if the indictment or information throughout did not show for what purpose the rioters assembled, the information was insufficient. In the case of *Follis v. State,* 40 S.W. 277, it was held that an indictment for unlawful assembly to prevent a party by violence from having a social gathering or dance at his house should allege that such party has a house and was giving or about to give a social gathering or dance. In *Luter v. State,* 22 S.W. 140, the Court held information was defective under Article 449 for failure to set forth the nature of the "lawful employment."

In *Briscoe v. State* (1961), 341 S.W.2d 432, the indictment was held defective because there was no notice as to whether the State would rely on intent by violence to disturb the victim and deprive him of his right to operate a lunch counter or would rely on proof on an intent to deprive him of such right by some means other than by the use of violence. The attention of the Court is also directed to *Tucker v. State* (1961), 341 S.W.2d 433, and *Johnson v. State* (1961), 341 S.W.2d 434. Likewise in *Jones v. State* (1962), 355 S.W.2d 727, the mere attempt to procure service at a railroad terminal without an act of violence or other violation of the law would not justify conviction.

We recognize that the right of lawful assembly is constitutionally protected. The Statute is not directed at a lawful assembly, but at the unlawful one which is not constitutionally protected. See *Cox v. Louisiana,* 379 U.S. 559. It is well settled that courts are inclined to adopt that reasonable interpretation of a statute which moves it furthest from possible constitutional infirmity, *Kovacs v. Cooper,* 336 U.S. 77, 69 S.Ct. 448, and *Cox v. New Hampshire,* 312 U.S. 569, 61 S.Ct. 762. It has likewise been held that even a lawful assembly is subject to state regulation, *Poulos v. State of New Hampshire,* 345 U.S. 395, 73 S.Ct. 760. In the latter case the Court stated at Page 405:

> "The principles of the First Amendment are not to be treated as premise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction . . . it has indicated approval of reasonable non-discriminatory regulation by governmental authority that preserved peace, order and tranquility without deprivation

> of First Amendment guarantees of free speech, press, and the exercise of religion. When considering specifically the regulation of the use of public parks, this court has taken the same position."

Appellant attacks the language "or by any other men." Such language is merely superfluous. The evil which is attacked by the statute is ". . . to aid each other . . . to deprive any person of any right or to disturb him in the enjoyment thereof."

To say that the Legislature must specify the many evils and corrupt practices which might constitute a deprivation of such a right would render a police regulation in connection therewith impossible, not pausing to consider the impropriety of expression which would also be necessary.

A reading of the information shows it did allege that the Appellants unlawfully met together with the intent and purpose to aid each other by sitting in the complainant's cafe to prevent and deprive him of the right to pursue his occupation, labor, and employment as owner of the Cafe Raven.

Contrary to Appellants' innuendoes in the third question presented, there were no Negroes in the sit-in group and no person was ever refused service. On the contrary, the evidence is clear that the complainant had integrated and had made a public announcement through the news media to that effect. The evidence showed he had served Negroes the previous day and on the day in question. Appellants were charged with a violation of the Texas Statute as a result of their refusal to depart from the premises of the Raven Cafe after being served and after being notified to depart therefrom by the owner and by the police officer. It

is important to note that this was not a protest against being refused service by a "public accommodation" under the Civil Rights Act of 1964. After having been served according to their wishes and allowed no less than three hours to consume their coffee, Coca-Cola, and water, they had no Constitutional right to be in the restaurant and their refusal to leave was a deliberate and calculated act by the entire group to prevent the complainant from pursuing his labor, occupation, and daily vocation. As indicated by Reverend Oliver, the sole purpose was to prevent service to others, in direct interference with Mr. Dabaghi's occupation and labor as a server of food.

Recently this Court upheld the application of a state trespass statute to protestants that refused to obey a sheriff's order to remove themselves from what amounted to the curtilage of a jailhouse. *Adderley v. Florida,* 385 U.S. 39.

In *Adderley* this Court stated:

> "Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute. . . . The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate. . . . Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitution-

al law was vigorously and forthrightfully rejected in two of the cases petitioners rely on, *Cox v. Louisiana,* supra, 379 U.S. at 554-555 and 563-564, 13 L ed 2d at 484 and 491, 492. We reject it again."

It certainly cannot be said that any person has squatters rights in any "public accommodations" under the guise of freedom of assembly. Nothing in the Constitution of the United States guarantees the right to an individual to use the property of another for unlawful purposes. There can not be any merit to Appellants' position that they had a constitutional right to stay in the restaurant and peacefully assembly. Such a position assumes that people have a constitutional right to do whatever they desire, whenever, however and wherever they please.

The statutes attacked herein are precisely and narrowly drawn regulatory statutes which provide that certain specific conduct be limited as proscribed. They are not so overbroad and vague by failing to define the boundary between permissible and impermissible conduct in a peaceful assembly.

The statutes are aimed at conduct of a limited kind; that is for persons who without lawful authority assemble to prevent any person from pursuing any labor, occupation or employment, or to intimidate any person from following his daily avocation.

Article 449 must be read in conjunction with Article 439 which defines "unlawful assembly." The prevention or interference with a person pursuing his labor by the assembly must be through violence, by a criminal act or in violation of an existing valid statute or court order (unlawfully). We submit that the Statutes in question are not unconstitutional on the grounds alleged.

Must this Court hear every case on the merits in which a defendant claims a statute of a state violates due process? If so, every time a state statute is enforced, the objection that it violates the Fourteenth Amendment of the Constitution of the United States would confer jurisdiction on this Court. The question in itself suggests the obvious negative response.

CONCLUSION

The Appellee respectfully submits that the Appellant presents no substantial question for review by this Court and that this Appeal should be dismissed or the judgment below should be affirmed.

Respectfully submitted,
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PROOF OF SERVICE

I, Hawthorne Phillips, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and do now enter my appearance in the Supreme Court of the United States in the above captioned cause, on behalf of the Appellee; I do further certify that a copy of the foregoing Motion to Dismiss or Affirm has been forwarded by United States Mail, First Class, Postage Prepaid, to Mr. Chris Dixie, 505 Scanlan Building, Houston, Texas 77002, Attorney for Appellant, this ------ day of September, 1968.

HAWTHORNE PHILLIPS
Assistant Attorney General